Office-Supreme Court, U.S.
FILED
JUL 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2274

IN THE

Supreme Court of the United States

October Term, 1981

JONNET DEVELOPMENT CORPORATION,
Petitioner,

v.

RICHARD S. CALIGUIRI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED 1

COUNTERSTATEMENT OF THE CASE 1

A. Reasons For This Counterstatement 1

B. Petitioner's Written And Repeated Requests For A Non-Jury Hearing On Its Claim For Injunctive Relief Prior To A Jury Trial On Its Claim For Money Damages 2

C. The District Court's Findings Of Petitioner's Fraud 8

D. Jonnet's Trial Strategy As Reflected By Its Counsel's Petition To Withdraw His Appearance 9

E. Proceedings In The Court Of Appeals 10

F. Petitioner's Pending Motion To Dismiss Its Claim For Damages In The District Court ... 11

ARGUMENT 12

I. THIS CASE PRESENTS NO SUBSTANTIAL SEVENTH AMENDMENT QUESTION BUT MERELY THE MUNDANE ISSUE WHETHER THE RECORD ADEQUATELY SUPPORTS THE DISTRICT COURT'S FINDINGS THAT PETITIONER HAD REQUESTED AND CONSENTED TO THE NON-JURY HEARING IN QUESTION 12

Page

II. THE DISTRICT COURT'S FINDINGS THAT THE EVIDENCE OF JONNET'S FRAUD WAS SO OVERWHELMING THAT REASONABLE MINDS COULD NOT DISAGREE RENDERS MOOT PETITIONER'S JURY TRIAL ARGUMENT 16

CONCLUSION 18

APPENDIX

Order of the United States District Court for the Western District of Pennsylvania dated June 16, 1981 ..... 1b

Transcript of the January 11, 1982 Argument Before the United States Court of Appeals for the Third Circuit 3b

Transcript of the June 28, 1982 Conference Before the United States District Court for the Western District of Pennsylvania (Excerpts) 26b

TABLE OF AUTHORITIES

CASES

Page

Beacon Theatres, Inc. v. Westover,
359 U.S. 500 (1959) 3, 6, 13

Black, Sivalls & Bryson, Inc. v.
Keystone Steel Fabrication, Inc.,
584 F.2d 946 (10th Cir. 1978) 17

Bowles v. Bennett, 629 F.2d 1092 (5th Cir. 1980) 14

Cox v. C. H. Masland & Sons, Inc.,
607 F.2d 138 (5th Cir. 1979) 17

Eldredge v. Gourley,
505 F.2d 769 (3d Cir. 1974) 16

Fenstermacher v. Philadelphia National Bank,
493 F.2d 333 (3d Cir. 1974) 13

General Business Services, Inc. v. Fletcher,
435 F.2d 863 (4th Cir. 1970) (per curiam) 15

Hanlon v. Providence College,
615 F.2d 535 (1st Cir. 1980) 15

Heyman v. Kline, 456 F.2d 123 (2d Cir.),
cert. denied, 409 U.S. 847 (1972) 14

Littlefield v. Fort Dodge Messenger,
614 F.2d 581 (8th Cir.), *cert. denied,*
445 U.S. 945 (1980) 15

Mesa Petroleum Co. v. Coniglio,
629 F.2d 1022 (5th Cir. 1980) 15

Monroe Auto Equipment Co. v. Heckethorn
Mfg. & Supply Co., 332 F.2d 406 (6th Cir.),
cert. denied, 379 U.S. 888 (1964) 17

Page

Omawale v. WBZ, 610 F.2d 20 (1st Cir. 1979) (per curiam) 15

Reefer Express Lines Pty., LTD. v. Arkwright—Boston Manufacturers Insurance Co., 87 F.R.D. 133 (S.D.N.Y. 1980) 15

Southland Reship, Inc. v. Flegel, 534 F.2d 639, *rehearing denied*, 539 F.2d 710 (5th Cir. 1976) 14

Tarboro v. Reading Co., 396 F.2d 941 (3d Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969) 16, 17

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 13

West v. Devitt, 311 F.2d 787 (8th Cir. 1963) (per curiam) 15

FEDERAL RULES OF CIVIL PROCEDURE

Rule 50(a) 16

Rule 52(a) 13

Rule 65(a)(2) 14

TREATISES

5 *Moore's Federal Practice*, ¶ 38.45 (2d Ed. 1981) 15

7 *Moore's Federal Practice*, ¶ 61.06 (2d Ed. 1979) 17

QUESTIONS PRESENTED

Whether the petition for a writ of certiorari presents a substantial Seventh Amendment question deserving the consideration of this Court where the issues are merely:

1. Whether the district court's findings of fact, as affirmed by the court of appeals, that petitioner had requested and consented to a non-jury hearing on its claims for equitable relief prior to a jury trial on its damages claim are "clearly erroneous"? and

2. Whether petitioner's jury trial argument is rendered moot by the district court's findings that the evidence of petitioner's fraud, forgery and perjury was so clear, precise and indubitable that reasonable minds could not disagree?

COUNTERSTATEMENT OF THE CASE

A. Reasons For This Counterstatement

The statement of the case set forth in the petition for writ of certiorari filed by Jonnet Development Corporation ("Jonnet") fails to state critical facts which respondents, Consolidated Rail Corporation ("Conrail") and its former Chairman, Edward G. Jordan ("Jordan"), believe are not only material to, but are dispositive of, the jury trial issue which Jonnet attempts to raise in its petition. Accordingly, respondents believe the Court is entitled to be informed of these facts.[1]

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[1]The failure of petitioner to set forth these facts in its statement of the case cannot be excused on the ground that counsel of record in this Court was not counsel of record in the district court or in the court of appeals. For not only is co-counsel for petitioner fully aware of them but most of them appear in the Findings of Fact made by the district court which are attached as an appendix to Jonnet's petition. (1a-20a)

B. Petitioner's Written And Repeated Requests For A Non-Jury Hearing On Its Claim For Injunctive Relief Prior To A Jury Trial On Its Claim For Money Damages

The record establishes that Jonnet repeatedly requested and consented to a non-jury hearing on the merits of its claim for injunctive relief prior to a jury trial on its claim for money damages. Because the most clear and concise summary of the record evidence on this point may be found in the Findings of Fact made by the district court (Ziegler, J.), respondents set forth the relevant excerpts from those Findings, as follows:

> "4. Jonnet Development Corporation instituted this civil action on March 18, 1981, against 22 defendants, alleging a conspiracy to restrain construction of a hotel by plaintiff in the Pennsylvania Railroad Station Complex in Midtown Pittsburgh.
>
> "Plaintiff also instituted a number of state court actions in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking specific performance, a constructive trust, and money damages.
>
> "The federal and state court equitable claims constitute a cloud on the title and ... have also prevented Consolidated Rail Corporation from scheduling a closing date and transferring title to the Urban Redevelopment Authority of Pittsburgh.
>
> "5. This case also has broad public interest connotations. All parties admit that the building is historically significant because it is a landmark and, due to its state of disrepair, it is wasting due to weather conditions.
>
> "6. In the complaint of the plaintiff, Jonnet Corporation seeks the following equitable relief at Paragraph 31:
>
> 'Voiding the Agreement of Sale between Defendant, CONRAIL, and Defendant, URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH,' and 'Enjoining Defendant, CONRAIL, and Defendant, URBAN

REDEVELOPMENT AUTHORITY OF PITTSBURGH, to convey the property of PENN STATION to Plaintiff.'

"The same requests for equitable relief are set forth in the WHEREFORE clause, namely, voiding the agreement of sale between Conrail and Urban Redevelopment Authority and enjoining the conveyance.

"7. Despite the teachings of *Beacon Theatres, Inc. vs. Westover*, 359 U.S. 500 (1959), plaintiff filed a motion for a preliminary injunction on April 7, 1981, alleging that legal relief was inadequate due to the existence of irreparable harm.

***

"8. At plaintiff's urging, a hearing was set for the earliest possible date, namely, May 26, 1981, at 10:00 a.m.

***

"9. Discovery had already commenced in the state court action in the case of plaintiff versis [sic] Consolidated Rail Corporation, GD No. 80-27589, and plaintiff continued its extensive efforts in this Court.

***

"10. On May 4, 1981, defendants, Consolidated Rail Corporation and Edward G. Jordan, filed a consolidated answer denying the averments of the complaint and, in a defense denominated as THIRTEENTH, averred as follows: 'As more fully set forth in the counterclaim hereto, Jonnet's claims in this action are founded upon a forged document which constitutes a fraud upon the Court.'

***

"11. On May 11, 1981, defendants, Jack D. Buncher and The Buncher Company, filed a motion to advance

and consolidate the trial on the merits with the motion of Jonnet for a preliminary injunction.[2]

"12. On May 20, 1981, Jonnet filed a motion to continue the hearing on the preliminary injunction. In its motion, Jonnet Development Corporation stated at Paragraph 9 as follows: 'With reference to BUNCHER's Motion. . .,[3] Plaintiff will consent to the same, provided that a new hearing date be set which would provide enough time to accomplish all depositions as aforementioned, together with the transcription of the same, together with time to inspect relevant documents and prepare for such a preliminary injunction hearing; it being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with Plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages.'

"13. On May 22nd, 1981, the Court granted the motion of Jonnet to continue the claim [sic] for equitable relief. The Court scheduled a hearing on plaintiff's request for equitable relief for June 8, 1981, at 10:00 a.m., at plaintiff's urging.

"The Court established a discovery schedule at the status conference of May 22nd, 1981, which would enable Jonnet Corporation to go forward on its claim for equit-

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[2]The motion clearly stated that it was requesting a consolidated trial on the merits "with respect to the prayer for injunctive relief" and that this consolidated hearing on Jonnet's request for such relief "will not preclude the Plaintiff from proceeding at a later date with a jury trial on its Complaint for Damages." (C.A. App. 41, 43) On May 15, 1981, Conrail and Jordan filed a motion requesting a pre-hearing conference in which they joined in defendant Buncher's motion and pointed out that one of the defenses they would present at the injunction hearing was "that the agreement upon which plaintiff relies as the basis for its claim is a forgery and constitutes a fraud upon the Court." (*Id.* at 49, 50)

[3]The phrase omitted from this quotation from Jonnet's motion is "to Advance and Consolidate Trial on Merits With Hearing on Motion for Preliminary Injunction." (C.A. App. at 56)

able relief on June 8, 1981, and postpone until a later date the claim of Jonnet for damages under the Sherman and Clayton Acts before a jury.

"Moreover, a review of the exhaustive discovery undertaken by Jonnet Corporation prior to the hearing of June 8 indicates that plaintiff was able and willing to proceed with its equitable claim for relief at that time.

"14. On June 4, 1981, the Court conducted a second status conference at the request of the parties. The Court ordered that since plaintiff was seeking equitable relief prior to consideration by a jury of plaintiff's claim for antitrust damages, the court should hear evidence at the hearing on June 8 concerning the defense of Conrail that Jonnet Corporation had knowingly filed suit or was relying upon a forged document.

"At page 3 of the transcript, the Court stated: 'One of the issues in this case raised by the defendants as an affirmative defense is that there has been a fraud on the court in that certain documents were altered and certain perjurious testimony has been presented. The question of whether or not there has been a fraud on the court is important as to whether equitable relief would be granted, and therefore the court will hear on Monday, June 8, through Thursday, June 11, 1981, the testimony from all parties concerning the question of whether or not any documents have been altered.'[4]

"The transcript at page 7 indicates that Jonnet Corporation agreed to this procedural device to determine plaintiff's right to equitable relief.[5]

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[4]As an accommodation to counsel for Jonnet who said that he needed additional time to conduct even further discovery on the merits of Jonnet's claim for injunctive relief (C.A. App. at 73-79), the court limited the hearing of June 8 to the fraud issue but made it clear that, in the event the respondents did not establish fraud at this hearing, Jonnet would be granted additional discovery on its claim for injunctive relief. (*Id.* at 85-88)

[5]As does the transcript at p. 2. (C.A. App. at 84)

"Further, it is obvious that since plaintiff was the party urging a trial on equitable relief prior to the antitrust claim for damages, and if Conrail established fraud by Jonnet Corporation by clear and convincing evidence, the equitable claims must be denied based on the equitable doctrine of unclean hands.

"Thus the use of Rule 42(b) was clearly appropriate under the circumstances, bearing in mind that Jonnet Corporation would litigate its legal issues before a jury at a later date, as urged by Jonnet from the outset.

"15. The foregoing facts make clear that the case of *Beacon Theatres vs. Westover*, 359 U.S. 500 (1959), is inapposite.[6]

"Plaintiff was the party that moved this Court to treat the equitable claim prior to adjudication by a jury of the legal issues for declaratory judgment and money damages. Plaintiff moved on two occasions for an advanced equitable hearing, and the Court set two dates for such a hearing, that is, May 22nd and June 8th, 1981.

"The use of Rule 42(b) with respect to plaintiff's claim for equitable relief was judicious, because if Conrail established the defense of unclean hands by clear and convincing evidence, plaintiff's claim for equitable relief must be denied.

"The transcript of June 8 makes clear the basis for our ruling, and Jonnet's motion for mandamus in the Court of Appeals and recusal to this Court is specious and without merit.

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[6]These facts, particularly this finding and Finding Nos. 7 and 11 through 14, as well as the court's ruling at the time it denied Jonnet's motion to impanel a jury (C.A. App. at 111-14), also clearly demonstrate that the district court did in fact base its denial of Jonnet's last minute motion to impanel a jury on Jonnet's repeated requests for, and consent to, a non-jury hearing on its claim for injunctive relief prior to a jury trial on its claim for money damages. The assertions to the contrary in Jonnet's petition (Pet. for Cert. at 14, 16) are simply false.

"The Court's ruling on June 8 concerning plaintiff's demand for a jury trial is also sound, since a bench trial is the proper means for adjudicating equitable claims which are pressed by a plaintiff at its specific request prior to consideration of the legal issues.

"The transcript of the proceeding on June 8 at pages 2 through 8 indicates that Jonnet Corporation will be accorded a trial by jury at a later date, if it desires, on its claims for declaratory relief and money damages." (Pet. at 3a-9a)

Thus, contrary to the statements in Jonnet's petition for a writ of certiorari, the record makes it pellucid that Jonnet repeatedly requested and consented, in writing and on the record, to a non-jury hearing on its claim for injunctive relief prior to a jury trial on its claim for money damages. Furthermore, on Friday, June 5, 1981, on the eve of that non-jury hearing, Jonnet filed a petition for a writ of mandamus in the United States Court of Appeals for the Third Circuit. In that petition Jonnet made no assertion whatsoever that the district court had denied or otherwise impaired its right to a jury trial but it merely requested a stay of the hearing pending further discovery.[7]

It was not until the start of the hearing of June 8, 1981 on the fraud issue, after Jonnet had reviewed the report of Conrail's document expert which made its fraud manifest, that Jonnet moved the district court to impanel a jury. (C.A. App. at 108-10) The court denied the motion for the reasons recited in its Findings of Fact, *supra*.[8] (C.A. App. at 111-14).

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[7]The petition was summarily denied that same day. (C.A. App. at 103-04)

[8]On June 9, Jonnet filed a second petition for a writ of mandamus in the Third Circuit in which it requested an order mandating the district court to impanel a jury for the fraud hearing. (C.A. App. at 147-53) Again, the petition was denied summarily. (Order of June 11, 1981, Aldisert, J.)

Jonnet then moved to withdraw its request for equitable relief but refused to withdraw its claims for such relief in the related state court actions. (*Id.* at 115, 118-23) The district court then asked counsel for Conrail to summarize the evidence he would adduce on the fraud issue. (*Id.* at 123) Following counsel's summary (*id.* at 123-34), the district court ruled that Conrail's allegations raised serious questions for the executive and judicial branches of government, including an alleged affront to the integrity of the judicial process. (*Id.* at 133-34)

C. The District Court's Findings of Petitioner's Fraud

The hearing conducted by the district court on June 8, 1981 was, thus, limited to the narrow question whether Jonnet was guilty of such fraud or other inequitable conduct as to preclude the grant of equitable relief.[9] At the conclusion of that hearing, the district court dictated comprehensive and well-considered Findings of Fact and Conclusions of Law into the record. (Pet. for Cert., at 1a-20a) Among other findings, Judge Ziegler found that the document upon which Jonnet relied as the basis for its claim contains material and intentional alterations and is a fraud (*id.* at 14a); that the evidence supporting that conclusion is clear, convincing, precise and indubitable (*id.* at 15a-16a); that reasonable minds could not disagree as to that conclusion (*id.* at 18a); that the fraud was intentionally perpetrated by Jonnet and its President, Elmer Jonnet (*id.* at 16a-17a); that Mr. Jonnet had testified falsely in this case on three separate occasions in furtherance of the fraud (*id.* at 17a);

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[9] As the district court stated at that hearing and thereafter, Jonnet's claim for damages under the antitrust laws, as well as Conrail's counterclaim, remain for trial before a jury or non-jury, in accordance with the demands of the parties. (C.A. App. at 112, Finding of Fact No. 15, *supra*, Pet. for Cert. at 9a). Indeed, following the hearing on the fraud issue, the district court established a discovery schedule on these claims and trial of them awaits only this Court's ruling on Jonnet's petition for a writ of certiorari. (C.A. App. at 214, App. to this Brief at 28b-30b)

that Jonnet was guilty of such unclean hands as to require denial of all equitable relief (*id.* at 17a-18a); and that, because this record contains serious allegations and evidence of criminal conduct, the court would order a copy of the transcript and all pleadings and papers forwarded to the United States Attorney for the Western District of Pennsylvania for appropriate consideration (*id.* at 19a).

Accordingly, the district court entered an order denying all of petitioner's claims for equitable relief with prejudice.[10] It is from the entry of judgment pursuant to that order that Jonnet appealed to the United States Court of Appeals for the Third Circuit. And it is from that court's judgment order of affirmance and its denial of rehearing (Pet. for Cert. at 22a-23a), that Jonnet has filed the instant petition for a writ of certiorari.

D. Jonnet's Trial Strategy As Reflected By Its Counsel's Petition To Withdraw His Appearance

Following the decision of the district court and the filing of Jonnet's appeal to the Third Circuit, trial counsel for Jonnet filed a petition to withdraw his appearance in the district court. In that petititon, counsel stated that he had not presented a substantive defense to Conrail's allegations of fraud, forgery and perjury but had "only presented technical defenses and legal arguments relating to Seventh Amendment rights to jury trial and the relevancy and materiality of the alleged document alteration." Counsel further stated that he had discontinued Jonnet's state court suit against Conrail because that suit "had attached to it and advanced to the Honorable State Court the document which was found to be forged by Elmer Jonnet." Counsel concluded that, as an officer of the court and as one bound by the Code of Professional Responsibility, he could not further represent petitioner or Elmer Jonnet. The district

[10]Because Jonnet failed to attach to its petition a copy of the order which was the subject of its appeal to the Third Circuit, respondents have attached a copy of that order in the Appendix to this Brief at 1b-2b.

court granted counsel's petition and Jonnet's appeal was thereafter prosecuted by new counsel.

In his brief in the court of appeals, new appellate counsel for Jonnet argued that trial counsel had declined to call Elmer Jonnet or an expert witness to testify at the fraud hearing in the district court because of the absence of a jury and the lack of opportunity for adequate preparation. (Brief for Appellant in the court of appeals at 12) At oral argument, that court questioned counsel for Jonnet on the inconsistency between his argument in that court and the facts of record, including those set forth in trial counsel's petition to withdraw. (Tr. of Argument, attached in Appendix to this Brief at 9b-10b, 13b-14b)

For Jonnet's trial counsel had represented to the district court at the hearing in that court that he had no substantive evidence whatsoever to offer on the fraud issue, except Mr. Jonnet's denial that he had altered the document in question. (C.A. App. at 160-61) Further, the record makes it clear that both Mr. Jonnet and his expert witness had ample opportunity to prepare and to testify. (C.A. App. at 172-73, 214) The real reason for their failure to do so is apparent from trial counsel's petition to withdraw from the case: their knowledge that the document was a fraud presented serious Fifth Amendment problems for Mr. Jonnet had he taken the stand and equally serious ethical problems for his counsel had he permitted Mr. Jonnet to do so.

Notwithstanding these record facts, new counsel for Jonnet in this Court continues to suggest that the absence of a jury was the reason for trial counsel's decision not to put Mr. Jonnet or Jonnet's expert witness on the stand. (Pet. for Cert. at 9, n. 5)

E. Proceedings In The Court of Appeals

Following the filing of comprehensive briefs in the Third Circuit, the case was argued before a panel of that court

consisting of Circuit Judges Hunter and Higginbotham and District Judge Ackerman on January 11, 1982. (Pet. for Cert., 21a) On February 16, 1982, that court entered a judgment order affirming the order of the district court. (*Id.* at 22a) On March 15, 1982, the full court denied Jonnet's petition for rehearing. (*Id.* at 23a)

In its petition for certiorari, Jonnet argues that the court of appeals did not give adequate consideration to its jury trial argument and that its decision is contrary to interpretations of the Seventh Amendment by this Court and by other circuit courts. An examination of the transcript of the oral argument before the court of appeals, however, a copy of which is attached in the Appendix to this Brief at 3b-25b, utterly belies this argument. For as that transcript makes manifest, the court of appeals gave full and understanding consideration to Jonnet's argument. Its affirmance of the district court was based upon the fact that the record fully supports the district court's findings that petitioner had requested and consented to the non-jury hearing in question. Accordingly, that ruling does not constitute a decision of broad, constitutional application. In light of the abundant evidence in the record in support of the district court's findings, the Third Circuit's judgment order of affirmance was not merely proper but was the most appropriate instrument of adjudication for such an ordinary sufficiency of the evidence question.

F. Petitioner's Pending Motion To Dismiss Its Claim For Damages In The District Court

During the pendency of petitioner's appeal to the Third Circuit and its petition for writ of certiorari in this Court, and pursuant to pretrial orders of the district court, the parties have been conducting discovery and other pretrial proceedings on petitioner's claim for money damages and on respondents' counterclaim for fraud, abuse of process and related torts. Under the latest pretrial order of the district court, the time for

discovery has expired, pretrial statements have been filed, and various motions to dismiss and for summary judgment on petitioner's claim are pending before Judge Ziegler. The district court and the parties are awaiting only this Court's ruling on Jonnet's petition for writ of certiorari before proceeding to trial of these damages questions.

It was in this context that the district court scheduled a pretrial conference for June 28, 1982. Prior to that conference new trial counsel for Jonnet had circulated to the district court and to counsel a proposed motion to dismiss petitioner's claim for damages pursuant to Fed.R.Civ.P. 41. At the pretrial conference, counsel for Jonnet requested the court to delay consideration of that motion until this Court has ruled upon Jonnet's petition for writ of certiorari, but counsel committed petitioner to dismissal of the damages claim, whether this Court grants or denies certiorari. See the excerpts from the Transcript of Proceedings of Pretrial Conference which are attached hereto at 26b-31b.[11] Thus, even should this Court grant Jonnet's petition for writ of certiorari and reverse the judgment of the Court of Appeals, Jonnet has committed itself to dismissing the damages claim which was the basis for the demand for a jury trial in its complaint.

ARGUMENT

I. THIS CASE PRESENTS NO SUBSTANTIAL SEVENTH AMENDMENT QUESTION BUT MERELY THE MUNDANE ISSUE WHETHER THE RECORD ADEQUATELY SUPPORTS THE DISTRICT COURT'S FINDINGS THAT PETITIONER HAD REQUESTED AND CONSENTED TO THE NON-JURY HEARING IN QUESTION.

The record establishes that petitioner repeatedly requested and urged the district court, in writing and on the

[11] Respondents were advised by the Clerk of this Court that they need not file a motion to supplement the record in this Court with this transcript or the transcript of the argument in the Court of Appeals but could merely attach a copy of the relevant excerpts from them in the Appendix to this Brief.

record, to grant it an expedited non-jury hearing on its claim for injunctive relief prior to a jury trial on its claim for money damages. In accordance with these requests, and with petitioner's written consent, the district court held a non-jury hearing which it ultimately limited to the narrow issue whether petitioner's fraudulent conduct in the prosecution of this action precluded any award of equitable relief to it. Thus, the narrow question presented by petitioner's appeal to the court of appeals, and by its petition for a writ of certiorari in this Court, is whether the record supports the district court's findings that petitioner had requested and consented to such a hearing.

The facts supporting this conclusion have been fully set forth in the counterstatement of the case, *supra*, and need not be repeated here. Suffice it to say that they fully support—indeed they compelled—the findings made by the district court. Certainly, these findings are not "clearly erroneous" nor based upon an error of law, the standard of review for a district court's findings under Fed.R.Civ.P. 52(a). *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Accordingly, as the district court ruled, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and its progeny are simply inapposite to the facts of this case. As this Court pointed out in that case, 359 U.S. at 510, a right to a jury trial can be dispensed with "by the assent of the parties entitled to it." Here, that right has not been dispensed with but has merely been deferred in accordance with petitioner's repeated requests and consent. The courts of appeals have affirmed findings of consent to a non-jury hearing on the merits of equitable claims on much more equivocal evidence of such consent than the evidence in this case.

For example, in *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333 (3d Cir. 1974), the district court held a hearing four days after the filing of the complaint on plaintiff's request for preliminary injunctive relief and announced at the

conclusion of that hearing that it would be deemed to have been a consolidated hearing pursuant to Fed.R.Civ.P. 65(a)(2). Although plaintiff apparently had not received advance notice of the consolidated nature of the hearing, he submitted a brief and proposed order in support of his request for equitable relief. On appeal of the denial of his claims, plaintiff argued that the district court had improperly denied him a right to a jury trial. The United States Court of Appeals for the Third Circuit (Biggs, C.J.), recognizing that a right to jury trial cannot be lost through determination of equitable claims, citing *Beacon Theatres*, nonetheless found that plaintiff had waived that right by his conduct. 493 F.2d at 338.

A similar result was reached in *Southland Reship, Inc. v. Flegel*, (Tuttle, J.), 534 F.2d 639, *rehearing denied*, 539 F.2d 710 (5th Cir. 1976). The district court, pursuant to Fed. R.Civ.P. 65 (a)(2), ordered a consolidated hearing on the merits of plaintiff's claim for equitable relief, after which a jury trial would be held on plaintiff's damages claim. The conduct of counsel for the parties at the hearing manifested their understanding of the nature of the consolidated hearing. Thus, the United States Court of Appeals for the Fifth Circuit ruled that plaintiff by its actions had acquiesced in a non-jury trial on the merits of its claim and had thereby waived its right to a jury trial. 534 F.2d at 644-45.

Thus, in both *Fenstermacher* and *Southland* a finding of waiver was based upon the conduct of the respective plaintiffs from which the courts implied a waiver of a right to a jury trial. Here, petitioner expressly agreed in writing to a non-jury trial on the merits of its claim for equitable relief prior to a jury trial on its claim for money damages. Further, that agreement was reiterated in at least two pretrial conferences immediately prior to the hearing and by petitioner's entire course of conduct in preparation therefor.[12]

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[12]Nor are *Bowles v. Bennett*, 629 F.2d 1092 (5th Cir. 1980) and *Heyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972), cited by

(Continued)

In these circumstances, petitioner's last-minute attempt at the start of the hearing to retract its express agreement to a non-jury hearing and to demand a jury trial was ineffectual. *E.g., Hanlon v. Providence College*, 615 F.2d 535, 538-39 (1st Cir. 1980); *General Business Services, Inc. v. Fletcher*, 435 F.2d 863, 864 (4th Cir. 1970) (per curiam); *West v. Devitt*, 311 F.2d 787,788 (8th Cir. 1963) (per curiam); 5 *Moore's Federal Practice*, ¶ 38.45 (2d Ed. 1981). In short, a litigant cannot demand a jury trial after having agreed to submit the matter to the court for determination.

Likewise, where a demand for a jury trial is made on the "eve of trial," it is not an abuse of discretion for the trial court to deny the motion. *E.g., Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022 (5th Cir. 1980); *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979) (per curiam). Similarly, a belated jury trial demand will not be honored where, as in the present case, it would delay resolution of the issues and is advanced as part of a "pattern of delay," *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir.), *cert. denied*, 445 U.S. 945 (1980), or to accommodate a party's "change in strategy" or "end run around its effective waiver of a jury trial," *Reefer Express Lines Pty., LTD. v. Arkwright—Boston Manufacturers Insurance Co.*, 87 F.R.D. 133, 135 (S.D.N.Y. 1980).

The foregoing considerations apply as well to the district court's denial of petitioner's last-minute attempt to withdraw its claim for equitable relief at the hearing on that claim. This delaying tactic would have severely prejudiced respondents by postponing resolution of the issue of plaintiff's fraud and would have continued the cloud on title to the property to the detriment of the public as well as respondents.

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petitioner (Pet. for Cert. at 15) in conflict with these cases. Indeed, they underscore respondents' point that this question is not one of far-reaching constitutional implication but is merely dependent upon the particular facts of each case.

Thus, the ruling of the district court in this case, and the affirmance of it by the court of appeals, is entirely consistent with the principles established by this Court in *Beacon Theatres*. The United States Court of Appeals for the Third Circuit has long recognized and followed the teachings of *Beacon Theatres* and has not hesitated to require compliance with its requirements in appropriate cases through the exercise of that court's mandamus powers. *E.g., Eldredge v. Gourley*, 505 F.2d 769 (3d Cir. 1974). In the instant case, however, there simply is no factual basis for the application of the jury trial requirements of *Beacon Theatres* because petitioner expressly requested and consented to the non-jury trial in question.

II. THE DISTRICT COURT'S FINDINGS THAT THE EVIDENCE OF JONNET'S FRAUD WAS SO OVERWHELMING THAT REASONABLE MINDS COULD NOT DISAGREE RENDERS MOOT PETITIONER'S JURY TRIAL ARGUMENT.

As previously stated, at the conclusion of the hearing on the issue of Jonnet's fraud, the district court made findings of fact and conclusions of law in which it found that the document upon which Jonnet relied as the basis for its claim contains material and intentional alterations and is a fraud (Pet. for Cert. at 14a); that the evidence supporting that conclusion is clear, convincing, precise and indubitable (*id.* at 14a-17a); *that reasonable minds could not disagree as to that conclusion* (*id.* at 18a); that the fraud was intentionally perpetrated by petitioner and its President, Elmer Jonnet (*id.* at 16a-17a); that Mr. Jonnet had testified falsely in this case on three separate occasions in furtherance of the fraud (*id.* at 17a); and that petitioner was guilty of such unclean hands as to require denial of all equitable relief (*id.* at 17a-18a).

Under Fed.R.Civ.P. 50(a), a district court is required to direct a verdict if it determines that the evidence is such that reasonable minds could not reach a different result. *E.g., Tar-*

boro v. Reading Co., 396 F.2d 941 (3d Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969). The district court, having determined that the evidence of Jonnet's fraud was so overwhelming that reasonable minds could not disagree, would have been compelled to direct a verdict had this case been tried to a jury. Thus, the district court's denial of Jonnet's motion to impanel a jury could not possibly constitute prejudicial or reversible error in this case.[13] *E.g.*, *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138, 144-45 (5th Cir. 1979); *Monroe Auto Equipment Co. v. Heckethorn Mfg. & Supply Co.*, 332 F.2d 406, 412 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964); *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 949-50 (10th Cir. 1978); 7 *Moore's Federal Practice*, ¶ 61.06 (2d Ed. 1979).

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[13]Because Jonnet's petition for a writ of certiorari must be denied on this ground of mootness, as well as the ground of Jonnet's consent to a non-jury hearing, the Court need not decide whether Jonnet's pending *voluntary* motion to dismiss its damages claim in the district court also makes moot its petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Counsel for Respondents, Consolidated Rail Corporation and Edward G. Jordan

RULE 28.1 CERTIFICATE

Respondent Consolidated Rail Corporation advises the Court pursuant to Rule 28.1 that it has no parent company and that it owns stock in the following subsidiaries (except wholly owned subsidiaries) or affiliates:

The Akron and Barberton Belt Railroad Company
Albany Port Railroad Company
The Belt Railway Company of Chicago
Calumet Western Railway Company
The Canada Southern Railway Company
Chicago and Western Indiana Railroad Company
Fruit Growers Express Company
Indiana Harbor Belt Railroad Company
The Lake Erie and Eastern Railroad Company
The Lakefront Dock and Railroad Terminal Company
The Monongahela Railway Company
The Niagara River Bridge Company (a wholly owned subsidiary of The Canada Southern Railway Company)
Nicholas, Fayette and Greenbrier Railroad Company
Peoria and Pekin Union Railway Company
Pittsburgh, Chartiers Youghiogheny Railway Company
Terminal Railroad Association of St. Louis
The Toledo Terminal Railroad Company
Trailer Train Company

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JONNET DEVELOPMENT CORPORATION,
Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL,
Defendants.

Civil Action 81-421

ORDER OF COURT

AND NOW, this 16th day of June, 1981, in accordance with the findings of fact and conclusions of law of record,

IT IS ORDERED that all claims of plaintiff, Jonnet Development Corporation, for equitable relief be and hereby are denied with prejudice.

../s/ DONALD E. ZIEGLER...
Donald E. Ziegler
United States District Judge

cc: John M. Silvestri, Esq.
Paul A. Manion, Esq.
Arthur J. Schwab, Esq.
D. R. Pellegrini, Esq.
Leonard M. Mendelson, Esq.
Robert M. Brown, Esq.
Joseph W. Conway, Esq.
John M. Feeney, Esq.
Michael C. Hanzel, Esq.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2182

JONNET DEVELOPMENT CORPORATION,
Appellant,

v.

RICHARD S. CALIGUIRI, et al.,
Appellees.

United States Courthouse
Philadelphia, Pennsylvania

Oral Argument

January 11, 1982

BEFORE:

HONORABLE JAMES HUNTER, III
HONORABLE A. LEON HIGGINBOTHAM, JR.
HONORABLE HAROLD A. ACKERMAN

PRESENT:

MICHAEL R. LEMOV, Esquire
LEIGHTON, CONKLIN, LEMOV, JACOBS
AND BUCKLEY, CHTD.
2033 M Street, N.W., Suite 800
Washington, D.C. 20038
Counsel for Appellant

PAUL A. MANION, ESQUIRE
MANION, ALDER & COHEN
718 Fifth Avenue
Pittsburgh, Pennsylvania 15219
Counsel for Appellees

PROCEEDINGS:

MR. LEMOV: May it please the Court, I am Michael Lemov. I am counsel for Jonnet Development Corporation, the plaintiff-appellant in this case.

This is an action under the Sherman and Clayton Anti-trust Acts for treble damages, legal relief. Plaintiff moved for a preliminary injunction. This is an appeal from an order and judgment at the United States District Court for the Western District of Pennsylvania denying plaintiff's demand for a jury trial and motion for a jury trial.

JUDGE HUNTER: Before you get started, it seems to me that I picked up something in the newspapers of recent developments in this litigation. Does that have any bearing on the argument here today?

MR. LEMOV: None whatsoever. As far as I know, the case stands in a posture that—

JUDGE HUNTER: Nothing is moot?

MR. LEMOV: Nothing is moot, sir.

JUDGE HUNTER: Let me hear from the other table.

MR. MANION: Your Honor, my name is Paul Manion, and I represent Consolidated Rail Corporation and Edward Jordan, its former Chairman.

We think that there are recent developments which bear upon the argument here today.

JUDGE HUNTER: Are you prepared to touch on them in your argument?

MR. MANION: Yes, I am, Your Honor.

JUDGE HUNTER: All right. The appellant says there is no recent development that affects it, and the appellee is going to say that there is.

That's not going to make this case moot; is it?

MR. LEMOV: The issue here, Your Honor, is a fundamental constitutional question. This is a one-issue appeal. You probably heard that before. This time it's true. One issue, Seventh Amendment right to a jury trial.

There is a line of cases, starting with Beacon Theatres versus Westover, United States Supreme Court; followed by Dairy Queen; Ross versus Bernhard.

This Court reiterated them clearly and described how a District Court should handle this kind of case.

In Eldredge versus Gourley, just a few years ago—

JUDGE ACKERMAN: Predecessor counsel handled it on May 20.

MR. LEMOV: That's it, yes. Counsel in his responsive pleading to their motion to consolidate the preliminary injunction with the hearing on the merits expressly reserved the right to a jury trial in writing.

JUDGE ACKERMAN: On what?

MR. LEMOV: On all issues that might come before the Court in a hearing, sir.

JUDGE ACKERMAN: "Plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust violations and damages."

Did I read that wrong, Counsel?

MR. LEMOV: You read that correct, I believe, Your Honor.

JUDGE ACKERMAN: I thought you said "all issues." Perhaps I didn't hear you.

MR. LEMOV: I don't understand the distinction you're making, Your Honor.

JUDGE ACKERMAN: You say in your brief that counsel has a right, under the Seventh Amendment, to a jury trial on the issue of fraud.

MR. LEMOV: Yes, sir.

JUDGE ACKERMAN: The contention here by your adversary is that he waived it. And I'm asking you whether in that statement didn't he reserve his right to a jury trial on the issue I just read.

MR. LEMOV: First of all, Your Honor, you have to realize that prior to that document on the twenty-second in response to a motion, there was a demand in the Complaint for a jury trial on all issues.

JUDGE ACKERMAN: At that time, in the motion, the plaintiff said, the last four lines: "It being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages."

MR. LEMOV: It's our contention that one of the issues tried by the Court was a part of the plaintiff's case on damages and antitrust violations.

JUDGE HIGGINBOTHAM: Counsel, what was supposed to be tried on this preliminary injunction?

MR. LEMOV: The probability of success on the merits. The classic preliminary injunction issues. Probability of success on the merits and irreparable injury to the plaintiff.

Your Honor, if I may say this. The District Court did not mention the scope of the hearing that it had until June 4, long after this pleading was filed.

At the time this pleading was filed, for all anyone knew, this was a general hearing on a preliminary injunction request.

And I believe this pleading, coupled with the demand in the Complaint, adequately preserved the right to a jury trial subsequent to the preliminary injunction hearing. And that's the probability of success on the merits.

If you look at the findings that this trial Court made after the bench trial, they are not preliminary injunction findings. They do not say there is no probability of success on the merits. They say that there is no contract here, that there is perjury, that there is fraud in the contract. Those are ultimate findings for a jury under our jurisprudence, under a legion of cases.

JUDGE HIGGINBOTHAM: Can you help me? Suppose a judge has a contract, which is what this case starts out as. And if you need the contract in your preliminary injunction and if you find that this contract has been forged, as the District Court judge found here, and fraudulently altered, what is the District Court judge supposed to do?

Is he supposed to not find forgery and not find fraud because you have a jury trial right later on?

MR. LEMOV: The Supreme Court dealt with that issue in detail. It says the first thing you do is try the legal issues and thereafter the Court hears the injunction issue.

JUDGE HIGGINBOTHAM: Wasn't fraud, forgery, perjury inherently involved in the preliminary injunction case?

MR. LEMOV: No, sir, I do not believe that's the case. In fact, if that's the case—

JUDGE HIGGINBOTHAM: No forgery was involved in the preliminary injunction case? Because weren't you relying on a contract?

MR. LEMOV: No. This is an antitrust case based not on a contract, but on the statutory right to damages under the Antitrust Act.

JUDGE HIGGINBOTHAM: Weren't you originally going for an injunction in order to require the railroad to turn over the property to you in accordance with what you thought was the contract?

MR. LEMOV: Plaintiff never submitted a contract in this case. It was defendant that raised the contract. The contract was never raised in this federal case because it's an antitrust claim, treble damages, an action at law. The jury trial is an essential element of that action at law according to Justice Black in Beacon, followed in Dairy Queen, followed in this Circuit.

JUDGE ACKERMAN: At one point, you wanted an injunction.

MR. LEMOV: Yes, because of a probable violation of the antitrust laws, not a contract.

JUDGE ACKERMAN: But you wanted an injunction, equitable relief?

MR. LEMOV: Yes, sir, preliminary.

JUDGE ACKERMAN: Preliminary injunction. And to get equity you have to come in with clean hands; right?

MR. LEMOV: Yes, but equity could have been denied.

JUDGE ACKERMAN: And fraud bears on that; doesn't it?

MR. LEMOV: Yes, Your Honor, that's right, except the Federal Rules—Rule 38 says that jury trial shall be preserved inviolate. Rule 39 on jury trial requires the jury trial right—

The Federal Rules are very eloquent. But in this case, to use the world "inviolate", it's a very strong word. But that jury trial right was not preserved inviolate in this case, and I will tell you why.

The reason is that the conspiracy alleged by the plaintiff was a conspiracy which was a reaction to his submitting a bid and getting a bid on his property. He could not defend himself in the so-called equitable hearing without getting into the question of who else might have the motivation to alter the contract.

JUDGE HUNTER: As a matter of mechanics, this came up in part in connection with a request by the railroad for a pretrial conference; right? That was in that request. The railroad specifically stated that the fraud defense would be raised in the claims for equitable relief. That's your injunction; right?

JUDGE ACKERMAN: Paragraph 6, doesn't it say, "In addition, defendants must be given an opportunity to present their defenses to plaintiff's claim, including the defense that the agreement upon which plaintiff relies as the basis for its claim is a forgery and constituted a fraud?"

I am reading from Conrail's motion for a prehearing conference, dated May 15, 1981.

MR. LEMOV: How many times does one have to ask for a jury trial right under the Constitution of the United States, to have it preserved on a crucial issue in a legal case?

The crucial issue in the case was: Was there a conspiracy to make sure the plaintiff couldn't build a hotel on the Penn Station property? That's the key issue.

Now, hear me out on this one. If the plaintiff was to defend against this argument that he submitted a false contract and sued on a false contract—on its face a rather strange argument—he had to assert in response to this fraud argument that there was no forgery and maybe the contract was collated improperly in the office of Conrail with their officers sitting there.

JUDGE ACKERMAN: Why wasn't Miss Metzler put on?

She had a week to make that contention. And as I read Mr. Silvestri's affidavit filed with this Court, he made a conscious decision not to present her.

Now, I know it must be embarrassing, but I ask that question.

MR. LEMOV: It's a pleasure that you're asking. It's not embarrassing at all.

Miss Metzler was faced with chemical testing which she was not capable of doing. She needed a second expert. Plaintiff's counsel did not learn until the trial that there was chemical testimony here. He had to go and get another expert. He couldn't do that over the weekend, even though he worked until 12:30 at night, according to his statement.

Individual counsel here, against most of the establishment law firms of the City of Pittsburgh, against the Mayor of the City of Pittsburgh, in a politically-charged atmosphere, counsel was asked to come up with a rebuttal and evaluation in approximately 48 hours without a chemical expert. That's one thing.

Secondly, Miss Metzler asked for three weeks.

The defendants had possession of the alleged forged document for more than three weeks in the pre-trial proceedings. They had them examined by experts all over the country.

It is clear, furthermore, that the real reason, one of the major reasons—I wouldn't say the real reason—why Miss Metzler was not put on and why the plaintiff's president never testified was there was a tremendous threat by the trial Court.

He stated before the trial even started: This may be appropriate for the United States Attorney or the Executive Branch.

That was absolutely—

JUDGE HUNTER: If there was perjury involved or fraud involved, wasn't it appropriate for the United States Attorney?

MR. LEMOV: Without question. It was appropriate for a jury to determine first, and later the Court could have done whatever it wanted. It could have had a second hearing and at that time held contempt, referred the matter—

The reason the appellant stood on its rights, constitutional rights to a jury trial was it was obvious the judge had already ruled against it.

JUDGE ACKERMAN: Did it stand on its rights, or did it by consenting to the application for that pre-trial order and by its own motion segregate out, if you will, the problem of the injunction and their defense to it and agree, to over-simplify it, to try that without a jury. That did not happen?

MR. LEMOV: Let me address that. No, sir, it did not happen. Let me, first of all, put it in context.

The Supreme Court in Aetna versus Kennedy said that the jury trial is such a fundamental right that—

JUDGE ACKERMAN: I asked why it didn't happen.

MR. LEMOV: There is no case cited in the appellees' brief—

JUDGE ACKERMAN: It didn't happen here?

MR. LEMOV: No, it didn't happen here.

Rule 39 of the Federal Rules, because of the graveness of the right of a jury trial, requires that a withdrawal of a demand in a Complaint, such as in this case, must be by stipulation in open Court or in writing between the parties.

It can in no way be interpreted to be a stipulation because it was conditioned by the words "with plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations."

The fraud issue goes to the law violations. It's absolutely a part of them. Because they are conspirators. They are the only other people who had a motive to alter the contract.

How could the plaintiff possibly defend itself against the fraud argument in a so-called pre-trial hearing without saying, "They did it; I didn't do it?"

JUDGE HIGGINBOTHAM: Can you help me a little on this?

MR. LEMOV: Yes, sir.

JUDGE HIGGINBOTHAM: Part of your fraud issue comes in terms of whether a bid had been submitted for an agreement of sale that was signed. Am I correct on that?

MR. LEMOV: The fraud issue comes—

JUDGE HIGGINBOTHAM: It involves at least that issue.

MR. LEMOV: That's right. We said so. We had a valid contract, the culmination of which was blocked by a conspiracy.

JUDGE HIGGINBOTHAM: As I read through your motion for your preliminary injunction, you speak in terms of, at paragraph two, they are entitled to receive the title because they were the highest bidder.

Now, in order for the Court to understand how they were the highest bidder and in order for the Court to understand the agreement of sale which you plead in paragraph ten, how can you say the District Court could avoid getting to the fraud issue and making findings on it?

MR. LEMOV: The only thing the District Court had to find was, in one simple finding, there was not a probability of success on the merits or there was no irreparable injury. It did not have to get into the findings which it made.

JUDGE HIGGINBOTHAM: Then what would come up—a very, very able lawyer, not as talented as you but good nevertheless, would come up and say, "The Court has given us a conclusion of probability of success. What were the facts?"

And we send it back and say, "District Judge, what were the facts?"

And then he says, "Fraud."

MR. LEMOV: Well, this issue has been dealt with repeatedly by the Courts. The situation is that the District Court would either empanel a jury on the—if it felt it had to go into a fraud issue, it could have a jury on the fraud issue under Rule 32, ordering the trial. It could have had a single-issue jury and then gone on to the major trial on the antitrust claim. That's one approach.

The second approach would be simply to defer the equitable question. I deny your request or offer the option to your request.

JUDGE HIGGINBOTHAM: Yes, but what reason?

MR. LEMOV: Wait. Now get to the merits.

He could have said to me if I was there: "Counselor, the jury trial was very fundamental. But if you go on to the preliminary injunction hearing, you are risking involving ultimate issues of law and maybe your right. Now take a choice."

The Court didn't do that. In fact, the Court never told them what the hearing was until weeks later after this. On the fourth of June, suddenly the Court pulled out the fraud issue. Counsel was literally overwhelmed and unprepared. He did not put his client on. He never had a fair trial on this issue.

JUDGE ACKERMAN: Just a moment, Mr. Lemov. Did I understand you to say a little while ago that Miss Metzler did not have enough time?

MR. LEMOV: That is our contention, sir.

JUDGE ACKERMAN: Do you have the record, page 173?

MR. LEMOV: Yes, sir, I do.

JUDGE ACKERMAN: Did she say it would take her fifteen to twenty hours?

MR. LEMOV: She also said she needed a chemical expert.

JUDGE ACKERMAN: Counsel, does the record reflect that it would take her fifteen to twenty hours?

MR. LEMOV: It says, "at least." That's right. At least fifteen to twenty hours.

JUDGE ACKERMAN: Didn't she have from Tuesday, June 9 until 1:30 p.m. the following Monday?

MR. LEMOV: She had that time, yes, sir. But she did not have a chemical expert available at that time.

JUDGE ACKERMAN: I assume we can take judicial notice of the fact that that's more than fifteen to twenty hours, if you will forgive my facetiousness.

JUDGE HIGGINBOTHAM: It may not be in Pittsburgh. The days go slower there.

MR. LEMOV: I shall only say, Your Honor, that all of this has been in the context of a proceeding that should have gone to a jury under the Seventh Amendment.

Thank you. I think my time has expired.

I would like to reserve one or two minutes, if I may.

MR. MANION: May it please the Court, my name is Paul Manion, and I'm counsel for Consolidated Rail Corporation and Edward Jordan.

Other counsel for the Urban Redevelopment Authority and for certain of the other individual defendants that Elmer Jonnet sued, some 24 individuals, are here, and they are available to answer any questions. But I am to undertake the task of representing the appellees.

At the outset, if I may, Your Honors, for Mr. Lemov to suggest that the contract was not a part of this antitrust case is just outlandish. Perhaps it's because he wasn't at the trial or he hasn't looked at the Complaint.

But as you pointed out, Judge Higginbotham, it was in the case from the beginning. It was in paragraph ten of the Complaint. The request was for injunctive relief. You read this Complaint, and what he is seeking is an injunction against Conrail's transfer of the property to the Urban Redevelopment Authority for a redevelopment project and that the Court affirmatively order that it be transferred to him pursuant to this fraudulent contract.

So to suggest that it wasn't in the case from the beginning is just false.

Secondly, when you read what Mr. Silvestri at the pretrial conference stipulated to, Beacon Theatres, Dairy Queen and that whole line of cases becomes totally inapposite because—

JUDGE HIGGINBOTHAM: Do you have the citation?

MR. MANION: Yes, at page 56.

This wasn't a preliminary injunction hearing, Your Honors. He had moved for a preliminary injunction on April 7. And yet, as Judge Ziegler pointed out in his findings at the hearing, that he said it wasn't fast enough when he gave them May 26, and, when we came in on May 22, he wasn't consenting just to hearing a preliminary injunction first.

You read the first part of his consent. It is: Consolidation of the motion for preliminary injunction with a hearing on the merits of injunctive relief.

And he is preserving only whatever is left in the jury trial for money damages.

That makes Beacon and it makes them all inapposite.

Now, the reason that it was important that this case be heard was because we had raised, not on May 22 as suggested here, but back in January of 1981—this man had filed five lawsuits, tying up an urgent and important redevelopment project to the City of Pittsburgh—this is all in the record—four of them in Common Pleas Court, one in Federal Court, deliberately doing it in a way that it put a cloud on the title by filing four equity actions in Common Pleas Court and then the claim for injunctive relief in this Court.

In our Answer in the State Court action, filed in January, six months before this hearing, we alleged as an affirmative defense that the document was a fraud, that it was a forgery.

And in this action, when I examined Mr. Jonnet on deposition, I presented that contract to him—and, again, this is all in the record—and he swore three times that "That is the contract on which I relied. That's the basis for my suit here."

So that's the context in which the Court should consider this jury trial argument.

I think when you look and you summarize the history of this case, when you consider it in its precise factual and procedural context, you come to the conclusion that Judge Ziegler's findings that this man was guilty of fraud, forgery and perjury—we proved that he perjured himself three times.

His whole position throughout the trial of the case was: "Well, I didn't need Conrail's approval."

Because what he had done, he had taken out two pages of the agreement that had that provision in it. One remained, and he said, "Well, they were all the same."

But there were critical differences. And as our document expert proved—he proved it so conclusively that Judge Ziegler, as he points out in his findings of fact, the evidence is overwhelming.

He took out the two pages that required board approval and specific notice in writing that the board had approved. Because the position he was taking throughout the litigation, all the State Court and Federal Court litigation, was: "Well, I had gotten approval when Mr. Jaeger said that he would submit it to the board."

We found out in the course of discovery—again, this is all in the record—that he had made three phone calls to Jim Kelly, who used to be Mayor Flaherty's assistant at Conrail, in August of 1980. He found out Kelly was at Conrail. And he said, "Jim, do you know Ed Jordan, the Chairman of the Board? I need approval of this contract, because the contract specifically requires approval. Can you get that approval?"

I asked him on deposition three times whether he ever did that, and he said, "No, because I didn't need it."

He was dealing with a fraudulent contract that had that provision eliminated.

Your Honors, for over a year and a half, a vital redevelopment project for the City of Pittsburgh which involves the Pennsylvania Station, the rotunda of which is on the National Register of Historic Landmarks, has been deteriorating rapidly.

From the time Mr. Jonnet filed this suit, he urged that it was vital that an early hearing be held. As Judge Ziegler pointed out, it was in the public interest to get an early determination of whether he was entitled to equitable relief.

We did extensive discovery, all directed to accommodating him. In Judge Ziegler's initial order at the time the Complaint was filed, not only did he order a hearing date but he ordered that we produce all of Conrail's officials at the hearing without a subpoena or anything. And we accommodated him.

We did extensive discovery on the merits of the injunctive relief claim. We went through two pre-trial hearings in which he reiterated his consent to consolidation of the trial on the merits of an injunctive relief claim with the preliminary injunction, preserving only whatever was left in the money damage action.

The money damage action doesn't place a cloud on the title to the property.

He did it not only in the motion where he consented, but two times thereafter, all the way up to the eve of trial. At the last minute he said, "I need more discovery. I can't go to trial, even on a preliminary injunction," or on the consolidation that he had consented to.

So what Judge Ziegler did was—he didn't even have to present evidence on the merits to even a preliminary injunction, he said, because the fraud issue, the question of whether there has been a fraud on the Court and on the parties and whether this man is guilty of forgery and perjury presents certainly a segregable issue.

I can't believe that a Court faced with an affront to its judicial process can't severe that issue and try it, especially in light of this consent.

And, therefore, that argument, the last argument that is made, that he needed more time for discovery, is utter nonsense. The only issue is whether this document had been forged.

As to Mary Metzler, in January they had notice. We told them, "This is a fraud. This is a forgery. We are going to prove it."

In May, at the first pre-trial conference, Judge Ziegler said, "These are serious accusations, and you had better get a document expert."

He ordered that we should make our report available. Judge Ziegler was most accommodating to this plaintiff. He ordered us.

I said, "Judge, we usually don't have to do that, especially in an injunction case and even in an action for money damages."

He said, "I'll tell you what. You make that available. When he gives you notice that he has a document expert, you give it to him 24 hours in advance."

And we agreed to do that.

This man was so cocky, Mr. Jonnet, when he took the stand. He thought that he was going to get away with a crime. It wasn't until we put the document expert on the stand that he finally asked for our expert report, on a Sunday morning. The trial was to start Monday morning.

When he saw what he was faced with, that's when these petitions for mandamus were filed in this Court, one on Friday afternoon after there had been no representation to Judge Ziegler that he was going to file a petition for mandamus. That was on the question of whether he needed further discovery; mind you, after the issue was narrowed to the question of whether this document was a fraud.

Mary Metzler sat in the courtroom. First off—it's in the record—she was first contacted on May 22, the day of the hearing.

And in the afternoon of that deposition, when I questioned Mr. Jonnet, after he said, "This is my contract," I asked him whether he had a document expert examine it. And he said no he hadn't, but, "You can be sure we are going to right now."

She had from May 22 until June 8.

Then we had two days of hearings, June 8 and 9. And the judge again—we were supposed to go from the 8th to the 11th. He had set these days aside to hear this case because of its importance. He said, "I will adjourn it and give you until the 15th."

He said, "Make your document expert available to Mary Metzler."

That's the kind of accommodation that Judge Ziegler gave to this plaintiff. And he asked our man how he conducted his test. Our expert testified that starting from scratch it would only take fifteen or sixteen hours—Your Honor, I have the citation to the record—to do anything. She didn't even have to start from scratch. She sat in the courtroom.

And what happened was we came back the next day to start the hearing, and we had a conference in chambers. And the judge asked what Mr. Silvestri was going to do for evidence.

He was only going to read from depositions. He states in open Court, at page 160, he has no substantive evidence to offer on the fraud issue.

It doesn't take much to understand why not when you read Judge Ziegler's findings of fact and conclusions of law. Your Honors, the evidence was so overwhelming.

We had a document expert show that the signatures which were on the last page of the document, the prior pages, had been turned over so the signature impressions should appear on page one. That was the one he had to eliminate because it required board approval.

And then there was page five that he had to eliminate, page 5 or six. I forget which.

And what this man showed in Court is that on the Jonnet document, page one has no impressions because that's the one that was substituted. We showed also, through ultra-violate techniques, that it was a different page altogether. It's even a different size. The fraud is so blatant.

One is in handwriting. It's a form that was filled in in handwriting. The other one is typewritten. So there was no question. One of the documents was a fraud.

He could offer no substantive evidence that Conrail did it.

In light of that, there are no impressions on the Jonnet document, on page one where they should first appear and be strongest. There are on pages two, three and four. It's missing from page five.

And the evidence is just overwhelming. Mary Metzler couldn't do anything with that evidence. She is a handwriting expert. We had scientific experts, one who worked for the State Police, now in Florida, and the performance, his demonstration of this fraud was just overwhelming.

On the question of recent developments, the urgency of this matter is reiterated by Judge Ziegler time and time again. The Pennsylvania Station has been abandoned for about four years, and it is deteriorating.

The article which Your Honor may have read spoke of the deterioration of the building and of the rotunda, which is a magnificent ediface, with the freezing and thawing weather. The last two winters have just been horrendous.

There is a feeling that if this case isn't resolved soon, the efforts taken by the URA notwithstanding, to try to take some remedial repairs will be to no avail.

In the face of Judge Ziegler's findings of fact and conclusions of law, these other four lawsuits, that's a recent development, have all been discontinued by the plaintiff so—

JUDGE ACKERMAN: The State suits?

MR. MANION: Yes, Your Honor, those which cast a cloud on the title.

So that the only case which still casts a cloud on the title is this one, because it's on appeal. It's an urgent matter.

We ask you to affirm the District Court. We think there is law here. We think that this man was accorded every right that anyone under our system of jurisprudence is entitled to, and then some.

My time is up. But, believe me, if you read the procedural history as set out in our brief, when you read the appendix, as I know you have on critical points, Dairy Queen and Beacon Theatres were merely the last procedural ploy of this plaintiff to try to further frustrate and delay the redevelopment project and the rehabilitation of the Pennsylvania Station.

Thank You, Your Honors.

MR. LEMOV: Five times the plaintiff-appellant asked for a jury trial in the Complaint.

JUDGE ACKERMAN: How many times did he waive it?

MR. LEMOV: He did not waive it at all. The Rules say that the waiver must be in writing or in stipulation in open Court.

JUDGE ACKERMAN: The motion—

MR. LEMOV: His motion did not waive it.

JUDGE ACKERMAN: That's according to how you read it.

MR. LEMOV: Judge, the Courts are uniform in holding that a motion to consolidate does not waive a right to a jury trial. I can give you three citations for that.

JUDGE ACKERMAN: All right.

MR. LEMOV: Proceeding to the question of what the Supreme Court was concerned about in Beacon, and that is: If a judge tries an element of a legal case, just an element, an issue, it's collateral estoppel in other cases.

That has happened already. Cases have been discontinued in State Court because the other side filed motions based on collateral estoppel—in this case, citing findings of fact which should have gone to a jury and repeatedly requested that they go to a jury.

All of the proceedings counsel so eloquently discussed at trial might have been entirely different, the testimony entirely different, the facts different if the constitutional procedures of the Seventh Amendment were adhered to.

It is inappropriate to erode those constitutional rights on so doubtful a question of waiver made by an attorney in a conference. There is only one possible way, and that's in a conference. And that was immediately corrected by mandamus to this court, by a written motion within three days.

We would urge the Court to—there is tremendous adverse publicity based upon a trier of the facts here which the Constitution says should not have heard this case because the issue is fundamental to the real antitrust claim.

You cannot restore the reputation that this plaintiff has lost because of this, but Your Honors can give him back, his company back the right to a jury trial.

We will expedite it. We will cooperate in every manner so that it is completed promptly and immediately.

The station was standing for two years before this contract was entered into with my client to buy the station. He put thousands of dollars down. He began renovating the building himself.

Is that a man who thought he didn't have a contract? He hired people. He renovated the building. He put $25,000 down for the second time with Conrail. He was all alone, without a lawyer. It was their real estate experts, their counsel were there, their forms, their collating machine, their Xeroxing machine.

The change of forgery here is a practical setup, and a jury will see that. A jury trial without the thrust of a judge with a preconceived position will see that fact. And the Constitution will be vindicated and so will this plaintiff.

Thank you.

CERTIFICATE OF SHORTHAND REPORTER

I, KATHERINE L. HIRST, Registered Professional Reporter, do hereby certify that the proceedings which appear in the foregoing transcript, pages 2 through 29a, inclusive, were taken by me in shorthand and thereafter reduced to typewriting by me or under my direction; that said transcript is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, or financially or otherwise interested in the outcome of the action.

.../s/ KATHERINE L. HIRST...
Katherine L. Hirst

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JONNET DEVELOPMENT CORPORATION,
Plaintiff,

vs.

RICHARD S. CALIGUIRI, et al.,
Defendants.

Civil Action
No. 81-421

TRANSCRIPT OF PROCEEDINGS

of pretrial conference held in the above-entitled action on Monday, June 28, 1982 before the Honorable Donald E. Ziegler, District Judge.

APPEARANCES:

For the Plaintiff:

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(The following proceedings were held commencing at 10:05 a.m.)

THE COURT: This is the case of Jonnet Development Corporation, plaintiff, versus Richard S. Caliguiri and others at Civil Action 81-421 and this is the date set for the pretrial conference by order of this Court. Further and originally, we had set a schedule for discovery on the equitable and legal claims of the plaintiff. That discovery schedule has now expired. Some of the parties have filed pretrial statements particularly the defendants. Others have filed motions for judgment which we will consider in due course.

On June 15, the Court received a letter from counsel for the plaintiff, namely, F. Peter Dixon which reads as follows: "Dear Judge Ziegler: Enclosed find a draft copy of the proposed motion to dismiss to be filed on behalf of Jonnet Development Corporation. As soon as I have received the original signed by the plaintiff's president, I will affix my signature and send on to you for consideration. I have likewise circulated draft copies to all other counsel in the case. I expect to submit the signed original not later than Monday, June 21, 1982."

I assume this means, Mr. Dixon, that the reason that you have not filed a pretrail statement on behalf of the plaintiff is that at some point you would urge the Court that the plaintiff is not interested in pursuing a legal claim for damages.

MR. DIXON: That's correct, Your Honor.

THE COURT: Further you by telephone notified me that you had orally requested the Court not to consider this motion until the Supreme Court has resolved the petition for writ of certiorari now pending in that Court.

MR. DIXON: Yes, Your Honor.

THE COURT: Is there any objection to that oral motion to delay the decision on the motion to dismiss the legal claims?

MR. FEENEY: Your Honor, is this going to mean—I know you haven't said it but does this mean this is going to delay decision on everything pending the certiorari motion?

THE COURT: I don't think so.

MR. FEENEY: Because I would object to that. Okay. All right.

THE COURT: The only thing before me at the outset is this oral motion by Mr. Dixon to delay considering the motion to dismiss the legal claim for damages until the Supreme Court resolves the petition for certiorari and that oral motion will be granted and we will delay until the Supreme Court rules the motion to dismiss by the plaintiff its legal claims.

Next we have a motion by Consolidated Rail Corporation and Edward [G.] Jordan and a [brief] to add Elmer Jonnet as counterdefendant on the counterclaim. The motion is clear and straightforward. The only concern I have is whether or not it is tardy, Mr. Manion, because discovery has closed and this is the day that the pretrial conference and the Court made its findings which are referred to in this motion sometime ago.

MR. MANION. I think not, Your Honor, for this reason that there is no prejudice by any lapse of time between your findings and the filing of the motion, that is, if we were dealing with the claim that required discovery—To begin with, [any] discovery that would be necessary on the claim presumably would be that of us, that is, Conrail but we see no—there's no need for any discovery, that is, there's nothing about this claim that required any kind of discovery. It's strictly a question of whether Mr. Jonnet can be held liable on the counterclaim that we have asserted and we see no prejudice of any kind from the motion to add him as a defendant and the case we cited in the Seventh Circuit I think makes this an a fortiori case because in that case there were multiple corporate officers whom the—I think it was the plaintiffs sought to add as defendants on the eve of trial and there could have been some objection [because] some of them were only tangentially involved but I think the evidence establishes in this case that when you speak of Jonnet Development Corporation, that is Elmer Jonnet so that the

identity of interests between the corporation and the individual defendant, the only individual defendant that we seek to add is even more apparent here than it was in that Seventh Circuit case but the point of it is that there's nothing about—It's strictly a legal matter based on the facts that were adduced at the earlier hearing and any facts concerning liability whether Mr. Jonnet can be held liable.

THE COURT: I see. We will give Mr. Dixon 15 days to file an answer to the motion and if you desire to recite any cases or provide a brief with that, he certainly has that right to do so and we will also consider that motion as soon as we have seen his response.

Is there anything else you want to say on the record with regard to that?

MR. DIXON: No, Your Honor. That's adequate.

MR. MANION: May I on the motion to dismiss, Your Honor? If I understand it that we have a commitment from the plaintiff that the basic claim for damages will be dismissed and that all that we're awaiting is the Supreme Court's decision on the petition for certiorari and that that will be dismissed whether the petition is granted or denied. As I understand it, the sole reason for deferral of the decision is a concern that if it's dismissed at this time that might be a relevant factor on the question whether certiorari would be granted but it is my understanding that you are going to dismiss ultimately.

MR. DIXON: That's correct.

THE COURT: All right.

MR. FEENEY: Claim for damages.

MR. DIXON: Right.

MR. FEENEY: Not the equitable relief.

MR. MANION: And that claim will be dismissed irrespective how the Court rules on the petition for certiorari.

MR. DIXON: That's correct.

THE COURT: Even if there should be a recantation on that commitment and at some point the plaintiff would attempt to assert the legal claim for damages.

I would point out that the plaintiff has not complied with our local rule. There is no pretrail statement filed and I think the Court would carefully consider dismissal of those legal claims for failure to comply with the local rule so in addition to that problem confronting the plaintiff, we also have the oral representation by its counsel that it does not intend to pursue at some point the legal claim for damages.

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(There was an off the record discussion.)

THE COURT: Thank you. The record will be prepared and the copies sent to all counsel at counsels' expense.

(The pretrail conference was thereupon concluded at 10:45 a.m.)

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and correct transcript of the proceedings held in the aforementioned action on Monday, June 28, 1982 before the Honorable Donald E. Ziegler, District Judge.

/s/ FLORENCE JONES

Official Reporter, U.S. District Court

Florence Jones
1023B Post Office Building
Pittsburgh, Pa. 15219
July 1, 1982